No. 04-19-00192-CR
No. 04-19-00193-CR
(Consolidated Appeals)

IN THE COURT OF APPEALS

FOURTH JUDICIAL DISTRICT

AT SAN ANTONIO, TEXAS

JOHNNY JOE AVALOS
Appellant

VS.

THE STATE OF TEXAS
Appellee

ON APPEAL FROM THE 437th DISTRICT COURT
BEXAR COUNTY, TEXAS

APPELLANT'S REPLY BRIEF

JORGE G. ARISTOTELIDIS
Tower Life Building
310 South St. Mary's St.,
Suite 1910
San Antonio, Texas 78205
(210) 277-1906
jgaristo67@gmail.com
SBN: 00783557

ORAL ARGUMENT REQUESTED

REPLY ISSUE ONE

State's Response

The State argues that the Appellant twice stated that the *Miller* Court held that a life-without-parole sentence imposed on juvenile capital defendants violates the Eighth Amendment to the United States Constitution. State's Response Brief (Response) at p.8, 10-11 (citing Appellant's Brief (AB) at 23, 34).

Appellant's Reply

Mr. Avalos's two passing references to the constitutionality of Tex. Penal Code § 12.31(a)(2), which requires the imposition of a life sentence on an intellectually disabled (ID) defendant were made with the understanding that a life sentence applied to an ID defendant is not *per se* unconstitutional, but that, consistent with *Miller v. Alabama's* holding, it is the imposition of an *automatic* life sentence to an intellectually disabled defendant, as occurred with Mr. Avalos, that violates the Eighth Amendment's prohibition against cruel and unusual punishment, under both the United States and Texas Constitutions.

REPLY ISSUE TWO

State's Response

The State recognizes that Mr. Avalos's challenge to the constitutionality of Tex. Penal Code § 12.31(a)(2) presents a case of first impression in Texas, and that the only appellate opinion that addresses it, *Parsons v. State*, No. 12-16-00330-CR,

2018 WL 3627527, at *4-5 (Tex. App.—Tyler July 31, 2018, *pet. ref'd*) (mem. op., not designated for publication), is an unpublished opinion with no precedential value. But, it maintains that though unpublished, *Parsons* is still persuasive authority for this Court to reject Avalos's Eighth Amendment challenge. Response 12-13.

Appellant's Reply

Though unpublished, an opinion may still possess persuasive qualities. But *Parsons* does not. In *Parsons*, the Tyler Court of Appeals observed that, "[a]lthough some of the reasoning behind the Court's decision in *Miller* might apply to intellectually disabled defendants as well as it does to juveniles, significant portions of the reasoning do not," citing these reasons as including "(1) juvenile offenders have greater prospects for reform than adult offenders, (2) the character of juvenile offenders is less well formed and their traits less fixed than those of adult offenders, (3) recklessness, impulsivity, and risk taking are more likely to be transient in juveniles than in adults, (4) a sentence of life without parole is harsher for juveniles than adults because of their age, and (5) a sentence of life without parole for juveniles is akin to a death sentence because of their age (citing *Miller* at 471-75)," reasoning "[w]e know of no reason to believe that these factors apply to intellectually disabled offenders." *Parsons* at * 12-13. Notably, though Parsons argued that though a 25-year old adult, she possessed "the mind of a 12-year old," however, nothing in the opinion suggests that Parsons submitted expert opinion

evidence to support the relevant intelligence parallels between juveniles and ID adults, as Avalos has done. Whether for this possible reason, or for no reason at all, *Parsons* appears to assume, without more, that in order for *Miller* to support Avalos's constitutional arguments, each of the five *Miller* elements must be clearly applicable to Mr. Avalos's posture as an ID adult, to merit relief. Finally, the Tyler appellate court did not discuss *Modaressi* or *Harmelin* (infra), suggested by the State as relevant to counter Mr. Avalos's constitutional challenge. *Parsons* simply does not provide persuasive authority, much less precedential value, for this Court when determining the merits of Avalos's well-reasoned and strongly supported arguments.

REPLY ISSUE THREE

Response Issue

The State posits *Modarresi v. State*, 488 S.W.3d 455, 464-67 (Tex. App.—Houston [14th Dist.] Houston 2016, no pet.), which relied upon the Supreme Court's ruling in *Harmelin v. Michigan*, 501 U.S. 957 (1991), as precedentially relevant to Avalos's constitutional challenge. Response 12-14. It further argues that *Modaressi's* holding militates against extending *Miller's* holding to Tex. Penal Code § 12.31(a)(2). [1] The State is wrong on both points.

[1] As the State concedes, *Harmelin* was a badly fractured, plurality opinion.

Appellant's Reply

In *Modaressi*, the Houston Court explained *Harmelin's* holding:

> In *Harmelin v. Michigan*, the defendant argued that his sentence of life without parole for possession of cocaine violated the Eighth Amendment because, inter alia, the trial court was statutorily required to impose that sentence without considering mitigating evidence. 501 U.S. 957, 961-62 [] (1991). In rejecting that argument, the United States Supreme Court reiterated its previous holdings that [] a death sentence is cruel and unusual under the Eighth Amendment if it is imposed without an individualized determination that the punishment is appropriate. *See id*. at 995 (citations omitted). However, the Court refused to extend this "individualized capital sentencing doctrine" to the context of a mandatory sentence of life in prison without parole. *Id*. at 995-96. The Court reasoned that no term of imprisonment—not even life without parole—could ever compare to the severity of capital punishment due to death being "unique in its total irrevocability." *See id.* (quoting *Furman v. Georgia*, 408 U.S. 238, 306, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (Stewart, J., concurring)).

Modaressi at 466.

The focus of Avalos's challenge is based on the irrefutable, expert-based parallels between juvenile and adult ID offenders - a discussion wholly absent in *Harmelin*, and in *Modaressi* - and not adults who possess conventional intelligence, but are afflicted with a mental illness such as Modaressi's bipolar disorder. As the Court in *Modaressi* explained, "the Harmelin court made no exceptions, including for a defendant who claims the mitigating evidence consists of the defendant's *mental illness* at the time of the offense. *Modaressi* at 466 (emphasis by Avalos) (citing *Harmelin* at 995-96). In that vein, *Harmelin's* inapplicability to juvenile defendants – whom Avalos finds materially indistinguishable to ID adults under the

Eighth Amendment - was squarely addressed in *Miller*, where the Court rejected Michigan's nearsighted reliance on *Harmelin* on this point, explaining:

> We think that argument myopic. *Harmelin* had nothing to do with children and did not purport to apply its holding to the sentencing of juvenile offenders. We have by now held on multiple occasions that a sentencing rule permissible for adults may not be so for children. Capital punishment, our decisions hold, generally comports with the Eighth Amendment--except it cannot be imposed on children.

Miller, 567 U.S. at 481 (1991).

Moreover, Mr. Avalos's intellectual disability is congenital and permanent. It cannot be "corrected." In fact, his condition is even more limited than that of the average juvenile offender, whose brain is expected to develop into full maturity through the simple passage of time. *See Miller*, at 471-72 (observing that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds"--for example, in 'parts of the brain involved in behavior control [citing *Harmelin*, 560 U.S., at 68]…[w]e reasoned that those findings—of transient rashness, proclivity for risk, and inability to assess consequences--both lessened a child's 'moral culpability' and enhanced the prospect that, as the years go by and neurological development occurs, his 'deficiencies will be reformed.'") (citing *Graham v. Collins*, 506 U.S. 461, 487 (1993) (quoting *Roper v. Simmons*, 543 U.S. 551, 570 (2005)). In this respect, Mr. Avalos's ID condition is *sui generis*, in that he is an adult that possesses the intellectual capacity of a child, an intellectual capacity that will *never* meaningfully develop. The State recognizes

the logical, sound and timely application of *Miller's* holding to Mr. Avalos's constitutional challenge, but cannot counter the Appellant's position. Neither *Modarresi* or *Harmelin* are relevant, much less determinative to a proper and fair resolution of Mr. Avalos's constitutional challenge.

REPLY ISSUE FOUR

State's Response

The State writes that "Appellant neither discusses nor cites *Harmelin*," adding that "the thrust of his argument is that *Miller* abrogated *Harmelin's* holding in cases involving intellectually disabled offenders." Response at 14. It further observes that "the *Miller* Court stated that its holding 'neither overrules nor undermines nor conflicts with *Harmelin*.'" (citing *Miller*, 567 U.S. at 482; *see also id*. at 480-82 (discussing the differences between adult and child defendants, and explaining that both death and children "are different")). "Thus," argues the State, "this Court should not extend *Miller's* holding in the face of *Harmelin's* clear precedent that the constitution does not require individualized assessments of adults facing life without parole."

Appellant's Reply

A reason that *Miller*, as characterized by the State, 'neither overrule[d] nor undermine[d] nor conflict[ed] with *Harmelin*" is because *Harmelin's* holding is inapplicable to juvenile offenders as a class, and, as Avalos argues, its equivalent

class of adult ID offenders under *Miller*. To support this argument, Avalos relies on *Miller's* predecessor, *Graham v. Florida* – which the State did not address in its response - where the Supreme Court found the death penalty to be analogous to life in prison without parole, when dealing with juveniles as a class of offenders. *See Graham v. Florida*, 560 U.S. 48, 69 (2010):

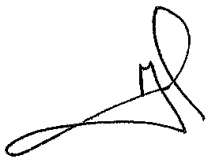
> It is true that a death sentence is "unique in its severity and irrevocability," *Gregg v. Georgia*, 428 U.S. 153, 187, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.); yet life without parole sentences share some characteristics with death sentences that are shared by no other sentences. The State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency--the remote possibility of which does not mitigate the harshness of the sentence. *Solem*, 463 U.S., at 300-301, 103 S. Ct. 3001, 77 L. Ed. 2d 637. As one court observed in overturning a life without parole sentence for a juvenile defendant, this sentence "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days." *Naovarath v. State*, 105 Nev. 525, 526, 779 P.2d 944 (1989).

Graham, at 69-70. Unlike the case in *Harmelin*, the Court explained that *Graham* "implicate[d] a particular type of sentence as it applies to an entire class of [juvenile] offenders who have committed a range of crimes. As a result, [the] threshold comparison between the severity of the penalty and the gravity of the crime [conducted in *Harmelin*] does not advance the analysis." *Graham*, at 61. In like manner, Avalos submits that his case implicates a particular type of sentence, life

without parole, as it applies to an entire class, ID adult offenders. Because under *Graham* a sentence of life without parole against juvenile offenders is materially indistinguishable from a death sentence, and the death penalty is prohibited against ID adults under *Atkins v. Virginia*, then it follows that *Graham* provides authority, in combination with *Miller'* holding, for the position that automatic life without parole sentences should be prohibited against all ID adults like Avalos, under the Eighth Amendment.

Respectfully submitted,

JORGE G. ARISTOTELIDIS
Tower Life Building
310 South St. Mary's St.
Suite 1910
San Antonio, Texas 78205
(210) 277-1906
jgaristo67@gmail.com



By: _____
JORGE G. ARISTOTELIDIS
SBN: 0078355

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Appellant's Reply Brief was served upon the Bexar County District Attorney's Office, in San Antonio, Texas by email, on the 16th day of September, 2019.

JORGE G. ARISTOTELIDIS

CERTIFICATE OF COMPLIANCE

In accordance, and in compliance with Tex. R. App. P. 9.4, I hereby certify that this Appellant's Reply Brief contains 1,774 words, which have been counted by use of the *Word* program with which this brief was written.

JORGE G. ARISTOTELIDIS